

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No.1:03-CV-00434 (HHK)
)	
SMITHFIELD FOODS, INC.,)	
)	
<i>Defendant.</i>)	
)	

**PLAINTIFF’S REPLY TO DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION
FOR LEAVE TO FILE A SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION**

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TABLE OF AUTHORITIES

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ARGUMENT

Given Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, the issue this court must resolve is whether Defendant Smithfield Foods, Inc. ("Defendant" or "Smithfield") exercises sufficient control over its subsidiaries so that Smithfield itself may be said to be transacting business in this District. *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25073, at *23 (D.D.C. Oct. 30, 2001) (holding that a parent is amenable to suit in a jurisdiction based on the contacts of its subsidiaries where the parent exercises a "control relationship over its subsidiary").

In its Opposition to Plaintiff's Motion for Leave to File a Supplemental Memorandum, Defendant asks this Court to exclude as irrelevant to this issue the sworn testimony of its current Chairman and Chief Executive Officer, Joseph W. Luter, III, regarding Defendant's corporate governance, as well as official reports Smithfield filed with the Department of Agriculture, arguing that the conduct or events described in this evidence occurred before or after the cause of action arose.¹ Essentially, Smithfield would have this Court ignore any evidence of events or conduct that occurred on dates other than June 26, 1998 or December 8, 1999.²

¹Defendant also argues that Plaintiff's motion should be denied because Plaintiff could have obtained the additional evidence in time for filing its initial Opposition to Defendant's Motion to Dismiss. Defendant's argument is unavailing. First of all, Defendant has not asserted, and could not assert, any prejudice because Smithfield is the source of both Mr. Luter's testimony and the Packers Reports (*see* Declaration of Raymond L. Edwards submitted in support of Defendant's Supplemental Reply at ¶ 2). Second, Plaintiff was initially unaware of the evidence. Once Defendant raised the jurisdictional issue, Plaintiff made every effort to obtain as much relevant evidence as quickly as possible.

²The evidence must permit the Court to conclude that a "control relationship" existed at a point in time that is appropriate to venue and jurisdiction based on Section 12 of the Clayton Act. Contrary to Defendant's assertion that this inquiry should always be made as of the time the cause of action accrued, the time of the filing of the complaint is appropriate in these

Smithfield cites no case that supports its position.³ Nor does Smithfield assert that its relationships with any of its subsidiaries changed on either of those dates, or on any other date for that matter. Therefore, any and all evidence of the nature and scope of Smithfield's relationships with its subsidiaries that casts light on whether Smithfield exerts sufficient control is relevant, regardless of when the particular events or conduct occurred. *See Verreries de L'Hermitage v. Hickory Furniture Co.*, 704 F.2d 140, 142 (4th Cir. 1983) (stating, in the context of a parent's liability for the activities of its subsidiary, that "[e]vents that depict the control of the parent over the subsidiary may be shown even though they occurred before or after" the event at issue because such evidence "casts light on the nature and extent of control . . . exercised at the [critical] time").

circumstances. When "the contacts relied upon to establish venue bear no relation to the plaintiffs' suit, the point at which the defendant must be transacting business in the district is the time the suit is filed." *King v. Johnson Wax Assocs.*, 565 F. Supp. 711, 717 (D. Md. 1983) (citing *Lee v. Ply*Gem Indus.*, 593 F.2d 1266, 1273 n.58 (D.C. Cir.), *cert. denied*, 441 U.S. 967 (1979)). Because Smithfield denies any direct contacts with the District of Columbia whatsoever, and sales made by Smithfield's subsidiaries to customers in the District of Columbia are not related to Smithfield's failure to comply with the Hart-Scott-Rodino Act, the appropriate timing question should be whether Smithfield was "transacting business" on the date the complaint was filed. *See, e.g., In re Chicken Antitrust Litig.*, 407 F. Supp. 1285, 1293 (N.D. Ga. 1975) (distinguishing cases holding that the critical time is when the cause of action arose on the basis that those cases involved suits arising from the defendants' transactions of business in the district and the defendants had withdrawn from the district at the time the suit was brought). In either event, the applicable date does not limit the evidence of control to a particular time frame.

³Defendant's reliance on *MCI Communications Corp. v. AT&T* is misplaced. In that case, the court disregarded evidence that, after MCI had filed its complaint, one of the defendants had filed a libel case in the same court in which MCI's case was pending and had, thereafter, opposed a motion to dismiss for lack of personal jurisdiction. 1983 U.S. Dist. LEXIS 13066, at *26 n.32 (D.D.C. 1983). That evidence had absolutely nothing to do with the question of whether that defendant controlled its subsidiaries for purposes of attributing their contacts to it.

Mr. Luter's deposition testimony is probative of Smithfield's exercise of control over its subsidiaries. As Chairman and CEO of Smithfield, Mr. Luter testified, among other things, that he approved subsidiaries' capital expenditures above a certain amount (*see* Exhibit 1 to Plaintiff's Supplemental Memorandum in Support of its Opposition to Defendant's Motion to Dismiss for Lack Of Personal Jurisdiction ("Plaintiff's Supp. Opp.") at 57:18-24), and that the presidents of the subsidiaries report to him. *Id.* at 32:8-20. At least one court in this District has found precisely the same kind of evidence relevant to whether the parent exercised control over its subsidiaries. *Vitamins*, 2001 U.S. Dist. LEXIS 25073, at * 31 (noting that facts that presidents of the subsidiaries reported to the parent and the parent entity approved subsidiaries' five year plans, annual budgets, and capital expenditures in excess of \$100,000 were indicia of control). Likewise, the reports filed by Smithfield's subsidiaries showing that Smithfield managers are among the reporting subsidiaries' officers is probative of how Smithfield exercises control over those subsidiaries -- through these executives. *See* Exs. 2, 3, and 4 to Plaintiff's Supp. Opp. Courts in this district have found such evidence relevant to whether the parent exercises control over the subsidiary. *Vitamins*, 2001 U.S. Dist. LEXIS 25073, at *28; *MCI*, 1983 U.S. Dist. LEXIS 13066, at *15; *Chrysler Corp. v. Gen. Motors Corp.*, 589 F. Supp. 1182, 1200 (D.D.C. 1984). The relevance and weight of this evidence should be unaffected by its date unless Smithfield comes forward with evidence showing that its conduct or practices materially changed.

CONCLUSION

Plaintiff has sought to submit additional, highly relevant evidence depicting Smithfield's control over its subsidiaries in 1997 (through the sworn testimony of Smithfield's Chairman and CEO giving his views of Smithfield's relationship with its subsidiaries) and in 2002 (through

reports filed by the subsidiaries showing that their officers included Smithfield executives), both intended to cast light on the various ways that Smithfield's dealings with its subsidiaries evince control. Given the absence of prejudice, this relevant evidence should be considered. For the foregoing reasons, Plaintiff respectfully requests that its Motion for Leave to File a Supplemental Memorandum be granted.

Dated: May 6, 2003

Respectfully submitted

Plaintiff, United States

By "/s/"
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